Nos. 95-1858 and 96-110

In the Supreme Court of the United States

October Term, 1996

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County

Petitioners,

v.

TIMOTHY E. QUILL, M.D., SAMUEL KLAGSBRUN, M.D., AND HOWARD A. GROSSMAN, M.D.,

Respondents.

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE, Attorney General of Washington,

Petitioners,

v.

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., PH.D.,

Respondents.

BRIEF OF SENATOR ORRIN HATCH, CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE; REPRESENTATIVE HENRY HYDE, CHAIRMAN OF THE HOUSE JUDICIARY COMMITTEE; AND REPRESENTATIVE CHARLES CANADY, CHAIRMAN OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE HOUSE JUDICIARY COMMITTEE, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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NOVEMBER 12, 1996

QUESTION PRESENTED

Whether state laws prohibiting assisted suicide are unconstitutional.

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INTEREST OF THE AMICI

These *amici curiae* have the honor of serving as chairmen of the Judiciary Committees of the United States Senate and House of Representatives, and of the Subcommittee on the Constitution of the House Judiciary Committee. In that capacity, the *amici* are directly concerned with the relationship of judicial and legislative authority under the Constitution. In addition, *amici* Hyde and Canady have conducted hearings on the subject of assisted suicide in the United States.

ARGUMENT

This *amicus curiae* brief is addressed to the most fundamental question of modern constitutional theory: When, and under what conditions, may courts invalidate duly enacted state or federal laws on the basis of unenumerated constitutional rights? Put differently: What are the respective roles of courts and legislatures in resolving contested questions of justice and political morality? On the one hand, we recognize that over the 209 years since adoption of the Constitution, the courts have, from time to time, exercised the power of judicial review in cases not compelled by the plain text of the Constitution, and rightly so. On the other hand, an unbridled power — whether called "substantive due process" or something else — to invalidate laws whenever five or more members of this Court deem them unwise or unjust would displace the legislative branch as the primary lawmaker. The purpose of this brief is to show that a principled middle ground exists, in which the courts may recognize and enforce constitutional rights in a fashion that gives due respect to the coordinate branches of government and the traditions of the people.

Under this approach, which is based on the text and history of the Fourteenth Amendment as well as leading precedents of this Court, the decisions of the courts below must be reversed. Assisted suicide is not, and never has been, recognized by this Nation as a protected constitutional right. In this brief, we focus on the due process argument of the Ninth Circuit, leaving the argument of the Second Circuit to others. But the institutional, prudential, and logical considerations we address apply to both decisions.

I. Assisted Suicide Involves Highly Contested Issues Of Morality And Public Policy, Which The Judiciary Is Ill-Suited to Resolve

A. Laws Against Assisted Suicide Are Supported By Serious And Substantial Ethical Justifications

We begin with a statement that may seem obvious, but must be the starting point for thinking about this constitutional controversy: the laws against assisted suicide have substantial moral and political justifications. These laws cannot be dismissed as arbitrary, antiquated, or unthinking.

Thoughtful and experienced doctors, ethicists, philosophers, lawyers, theologians, and advocates for patients have offered cogent reasons why assisted suicide should not receive the formal sanction of law. The professional associations in the disciplines closest to the problem — the American Medical Association, the American Psychological Association, the American Geriatric Society, and the American Bar Association among them — have all concluded that assisted suicide should not be made legal. The two most thorough and distinguished studies undertaken of the issue — one under the auspices of the State of New York and one under the auspices of the British House of Lords — both resulted in *unanimous* recommendations that laws against assisted suicide (as well as euthanasia) should be retained. New York State Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* (1994) [hereinafter cited as "NEW YORK REPORT"]; *Report of the Select Committee on Medical Ethics*, House of Lords, Sess. 1993-94. On April 29, 1996, the Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives conducted hearings in which ethicists, physicians, legal experts, and specialists in the care of terminally ill, suffering, and disabled patients presented their perspectives on the issue. *Assisted Suicide in the United States:* Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. (1996) [hereinafter cited as "HOUSE HEARINGS"]. We commend those reports and hearings to this Court's attention.[1]

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[1] For the convenience of the Court, we have lodged copies of the HOUSE HEARINGS with the Clerk. We understand that copies of the New York and House of Lords reports have been lodged by others.

We will briefly summarize some of the reasons for prohibiting assisted suicide set forth in these sources, not because we believe the Court should resolve the underlying moral-political dispute, but because the lower courts' decisions were based on a mistaken belief that there are no plausible state interests (excluding religious dogma) in protecting the life of a terminally ill patient. In reaching their conclusions, the courts gave no deference to the nearly unanimous judgments of state legislatures and state courts, nor to the similar conclusions of distinguished ethicists, physicians, and others who have devoted their lives to the care of suffering patients. Judge Reinhardt's opinion for the Ninth Circuit dismissed contrary opinions as "cruel" (Pet. App. A75), "untenable" (*id.* at A76), "disingenuous and fallacious" (*id.* at A85), "meretricious" (*id.*), "ludicrous," (*id.*), and "nihilist" (*id.* at A98). The court praised its own view as "more enlightened" (*id.* at A76). The court characterized hundreds of years of common law precedent as "taboos," linked to superstition (*id.* at A46); brushed aside the central text of medical ethics, the Hippocratic Oath, saying that it "does not represent the best or final word on medical or legal controversies today" and that to follow it "literally" would be "preposterous" (*id.* at A95); and criticized arguments made by the American Medical Association and American Geriatric Society (among others) as reflecting "a misunderstanding of the proper function of a physician" (*id.* at A91). The sublime arrogance of these judicial pronouncements highlights the danger of allowing courts to set social policy, in defiance of legislatures and referenda, on the basis of their own (often ill-informed) philosophical intuitions.

Although there are many arguments in favor of laws prohibiting assisted suicide, we will summarize four of the most important.

First, even assuming *arguendo* that in a limited number of cases assisted suicide might be ethically permissible, many knowledgeable observers believe that the problems of abuse would be so widespread and uncontrollable that formal legal and ethical

prohibition remains necessary.[2] The harsh reality is that a more expeditious death for terminally ill patients would often serve the interests of others, especially in this era of managed care and exploding medical costs. A patient weakened by illness and pain is peculiarly susceptible to influence from family members or doctors who are in a position of trust. It will not be difficult for these individuals, for their own reasons, to exert subtle — but powerful — pressure on a frail patient to "choose" the convenient option of a speedy death. Even the suggestion by a well-meaning doctor that a patient should consider the option of death will inevitably convey the message that — in the doctor's informed professional opinion — her life is no longer worth living.[3]

For every suffering person who makes a rational, informed choice to die, there will be others — perhaps many times as many — on whom that "choice" is effectively imposed. And there will be no way to tell the difference.

Safeguards, no doubt, will be proposed. Indeed, the Ninth Circuit professed faith that "sufficient protections" can be enacted. Pet. App. A103-A104. Unfortunately, these were expressions of hope rather than descriptions of experience. Many physicians and ethicists doubt that effective safeguards can be devised or enforced — especially since typically no one involved in the death will have the incentive to expose wrongdoing, and the interactions involved are cloaked in the confidentiality of the doctor-client relationship. The American Medical Association's code of Medical Ethics, for example, rules out physician-assisted suicide partly on the ground

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[2] See NEW YORK REPORT, at xii, 102, 119-20, 140.

[3] See Testimony of Dr. Herbert Hendin, HOUSE HEARINGS at 113; Leon Kass & Nelson Lund, *Physician-Assisted Suicide, Medical Ethics and the Future of the Medical Profession*, 35 Duq. L. Rev. 395, 409 (1996).

that it "would be difficult or impossible to control."[4] Even counsel for the respondents, Professor Tribe, has observed:

> [T]he judiciary's silence regarding [the right to determine when and how to die] probably reflects a concern that, once recognized, rights to die might be uncontainable and might prove susceptible to grave abuse * * * . [T]he resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting persons, may endanger personhood.

Laurence H. Tribe, *American Constitutional Law*, § 15-11, at 1370-71 (2d ed. 1988).

The specter of widespread abuse and exploitation is not based on mere speculation. Studies of assisted suicide and euthanasia in the Netherlands, where safeguards are stringent on paper, show that those safeguards are routinely disregarded. Although medical guidelines recognize the right to die only based on the patient's own informed and voluntary decision, a survey of 300 physicians disclosed that over 40 percent had performed euthanasia *without* explicit consent. In 1990, in addition to 2,300 cases of active euthanasia with consent and 400 cases of assisted suicide, there were over 1,000 cases of active nonvoluntary euthanasia performed without the patient's knowledge or consent, including roughly 140 (14 per cent) where the patient was fully competent. Comparable rates of nonvoluntary euthanasia in the United States would be roughly 20,000 per year.[5] And these numbers do not even include

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[4] Opinion of the Council on Ethical and Judicial Affairs, American Medical Association, Opinion 2.211. For the most extensive discussion of these issues, see Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. Rich. L. Rev. 1 (1996). See also NEW YORK REPORT, at 73; Testimony of Dr. Lonnie Bristow on behalf of the American Medical Association, HOUSE HEARINGS at 316-17 ("it is difficult to imagine adequate safeguards which could effectively guarantee that patients' decisions to request assisted suicide were unambivalent, informed and free of coercion"); Testimony of Dr. Herbert Hendin, HOUSE HEARINGS at 115.

[5] See John Keown, *Further Reflections on Euthanasia in the Netherlands in the Light of the Remmelink Report and the Var Der Maas Survey*, in Lucke Gormally,

cases where "consent" was extracted by means of undue influence, psychological coercion, or skewed information.

Giving choices to the vulnerable is not always liberating. A young woman is not more "free" if the law allows her to contract with a pimp; a young man is not more "free" if a pusher can sell him crack cocaine; a child is not more "free" if he or she can "consent" to sexual advances by adults; people are not more "free" if they can voluntarily sell themselves into slavery. Nor is an ill person necessarily more "free" if he can agree to kill himself. Indeed, the mere availability of assisted suicide as a socially-legitimated alternative may impel some who would prefer to live to accept this course out of feelings of guilt or shame about the burdens (financial and otherwise) that the choice of continued living would impose on their families. These laws are not an instance of some people "imposing their morality" on others. They result from citizens reflecting on the conditions that they may face at the end of life, and establishing rules that will protect all of us, when we are weakest and most vulnerable.

Second, if patients' requests for assistance in suicide are honored, many will die unnecessarily. According to medical experts, the desire to commit suicide (even among the terminally ill) is typically associated with clinical depression, which is a treatable disease.[6] The New York State Task Force reported: "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at time of death. Depression, accompanied by symptoms of hopelessness and helplessness, is the most prevalent condition among individuals who commit suicide." NEW YORK REPORT at 11; see also *id.* at 13 ("In one study of terminally ill patients, of those who expressed a wish to die, all met diagnostic criteria for major depression"); J.H. Brown, *et al.*, *Is It Normal for Terminally Ill Patients to Desire Death?*, 143 Am. J. of Psychiatry 208 (1986).

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ed., EUTHANASIA: CLINICAL PRACTICE AND THE LAW 193, 209, 221-25 (1994); Callahan & White, *supra*, 30 U. Rich. L. Rev. at 15-18. See also Carlos F. Gomez, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS (1991); Testimony of Dr. Herbert Hendin, HOUSE HEARINGS at 106-13, 114-15.

[6] See Testimony of Dr. Herbert Hendin, HOUSE HEARINGS at 103-06.

When treated for depression, patients typically cease to desire suicide. NEW YORK REPORT at 26 (treatment of depression "resulted in the cessation of suicidal ideation for 90 percent of these patients").

Much of the desire to commit suicide is also traceable to insufficiently aggressive measures to alleviate pain.[7] When a suicidal patient is helped to deal with pain and depression, he or she typically is restored to the natural desire to live. To give patients the "right" to obtain assistance in suicide is to license the killing of persons who often are simply in need of help, which modern medicine can give. Professor Herbert Hendin, a professor of psychiatry at New York Medical College, testified:

> Patients who request euthanasia are usually asking in the strongest way they know for mental and physical relief from suffering. When that request is made to a caring, sensitive, and knowledgeable physician who can address their fear, relieve their suffering, and assure them that he or she will remain with them to the end, most patients no longer want to die and are grateful for the time remaining to them.

HOUSE HEARINGS at 115-16.

Since American doctors are notoriously uninformed about proper pain prevention techniques,[8] as well as depression,[9] it is almost certain that many people will be induced to die when instead they could receive effective palliative treatment.[10] The ethical

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[7] NEW YORK REPORT, at 16-17; Testimony of Dr. Lonnie Bristow on behalf of the American Medical Association, HOUSE HEARINGS at 309-10.

[8] NEW YORK REPORT, at 33 ("pain is often overlooked by health care providers"); *id.* at 43 ("the delivery of pain relief is grossly inadequate in clinical practice"); Testimony of Dr. Kathleen Foley, Chief of Pain Service at Memorial Sloan-Kettering Cancer Center, HOUSE HEARINGS at 18-20.

[9] NEW YORK REPORT, at 32; *id.* at 32-33 (study found that fewer than 15 percent of depressed residents of a nursing home for the elderly had been correctly diagnosed, and fewer than 25 percent had been treated for depression).

[10] See NEW YORK REPORT, at 40 ("modern pain relief techniques can alleviate

problem is magnified by the fact that economically disadvantaged patients and members of racial and ethnic minorities are the most likely to lack proper treatment for pain and depression,[11] and thus the most likely to "choose" — unnecessarily — to die. Other groups especially at risk are women and the elderly.[12]

Third, if death is defined as a "mercy," it will be difficult to justify refusing this mercy to broader and broader categories of sufferers. It is therefore misleading to confine one's attention (as the lower courts did) to "competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors" (Pet. App. A116).[13] For example, the moral arguments supporting assisted suicide for terminally ill patients who are able to self-administer the killing agent apply just as strongly to similar patients who cannot do the deed for themselves. Thus, assisted suicide will merge into voluntary active euthanasia.[14] And the moral arguments supporting assisted suicide for the terminally ill apply with as much force — maybe more — to persons who face not a few weeks or months, but years of pain that seems to them intolerable. Thus, assisted suicide for the terminally ill will almost surely merge into assisted suicide for those with incurable chronic

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pain in all but extremely rare cases"); Testimony of Dr. Lonnie Bristow on behalf of the American Medical Association, HOUSE HEARINGS at 310, 314-15.

[11] NEW YORK REPORT, at 44, 46; Testimony of Dr. Carlos Gomez, House Hearings at 412.

[12] NEW YORK REPORT at 44; see also *id.* at 33.

[13] It is a striking example of the illogic of the decisions below that they declare the longstanding distinction between assisted suicide and refusal of life-sustaining treatment to be a distinction without a difference, only to propose new distinctions that have far less logical, empirical, or ethical justification. See Yale Kamisar, *The Right to Die: On Drawing (And Erasing) Lines*, 35 Duq. L. Rev. 481 (1996).

[14] *Id.* at 513-19; Dan W. Brock, *Voluntary Active Euthanasia*, Hastings Center Rep., Mar.-Apr. 1992. Indeed, the Ninth Circuit intimated that it did not regard the distinction between assisted suicide and active voluntary euthanasia as significant. Pet. App. A100-101.

conditions.[15] Persons with serious disabilities will be particularly at risk.[16] And (as cases like *Cruzan* so eloquently demonstrate), the argument for assisted suicide for competent adults will apply with seemingly equal force to those unable to consent for themselves, whose "right to die" will be exercised by surrogates. If death is seen as a mercy, why confine it to those fortunate enough to be able to consent? The same corrosive skepticism that the courts below evinced toward the distinction between refusal of treatment and active assisted suicide will be equally potent to dissolve all of the other limitations on this newfound right.

It is even difficult to understand why, under the reasoning of the Ninth Circuit, the mercy of assisted suicide should be denied to persons who, for reasons other than ill health, conclude that the suffering of life is unbearable. Physical pain and impending death are not the only — and not necessarily the most serious — reasons to desire a release from these mortal coils. Many of the examples in the lower court's opinion of suicide in other cultures involve suicide for reasons of honor, guilt, or grief. Pet. App. A40-A42. Patients are free to refuse life-sustaining treatment for any reason whatsoever. Once we conclude that death is a matter of personal autonomy — of privacy — where can we stop?[17]

Fourth, and most fundamentally, by making death a legally available "choice," we will inevitably change the way our culture perceives the final stages of life. When death is not an official option, the focus of the patient, the patient's family, the doctor, and the system is on what can be done to make the patient's life easier and better. If death becomes an approved social option, both the patient and the system will tend, instead, to focus on whether continued care is "worth it." The patient, aware of the burden she is imposing on loved ones, may well conclude that she "owes it"

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[15] See Kamisar, *supra*, 35 Duq. L. Rev. at 502-13.

[16] Testimony of Diane Coleman, in HOUSE HEARINGS, at 53-54; Statement of Diane Coleman and Carol Gill, *id.* at 53-70.

[17] The implications of this decision extend beyond assisted suicide and euthanasia. For example, what will be the effect on laws allowing the use of physical force to prevent suicide?

to her family to commit suicide. The decision to cling to life may come to be regarded as wasteful, irrational, and selfish. In the uniquely vulnerable circumstances of the lingering patient, the "right to die" will become, for many, the duty to die. See NEW YORK REPORT at 95. One blessing of the current law is that it relieves the elderly and the infirm of the need to justify their continued existence.

Even if the laws against assisted suicide are rarely enforced, they still have the effect of expressing society's deep commitment to the protection of human life. In combination with the ethical precepts of the medical profession, these laws ensure that assisted suicide remains a highly exceptional activity, rarely suggested or initiated by physicians. If assisted suicide is recognized as a "right," it will become both routinized and common. It is not obvious that patients would be better off.

These are among the reasons that have persuaded the New York legislature and the people of the State of Washington (along with most other states) to retain their laws against assisted suicide. These *amici* find the arguments compelling. We fear the consequence of the liberation of death, especially for the most vulnerable among us. But we do not ask this Court to adopt our view of the moral consequences of legalized assisted suicide. Indeed, the point we wish to make is that this case should not be decided on the basis of the Justices' own assessment of the weight of the competing moral arguments. Rather, as members of the legislative branch of government, we maintain that this is not a question for courts to decide — or more precisely, that there is no legitimate basis in the Constitution of the United States for overturning the laws that have been enacted by the various states on this issue.

B. Constitutional Judicial Review Is Too Inflexible An Instrument For The Decision Of Such Questions

Even apart from the specifics of constitutional doctrine, there is every reason for courts to be wary about overturning duly enacted legislation on the basis of untried and uncertain moral and philosophical arguments, where the result is bereft of support in directly relevant constitutional text or in national experience. It may well be true that attitudes about the end of life have changed,

or will change, in response to technological developments and their attendant economic and emotional consequences. But it would be a grave mistake for the federal courts to leap in and attempt, prematurely, to resolve the issue or to accelerate the pace of change. Even on the heuristic assumption that laws against assisted suicide and euthanasia should be relaxed (which these *amici* doubt), it is better that reform take place in decentralized and accountable institutions.

The great institutional strength of courts is their ability to provide uniform enforcement of legal principles, with consistency across parties, regions, and time periods, treating like cases alike. Where operative principles are in flux and the consequences of new approaches are unpredictable, however, that virtue becomes a vice. Constitutional judicial review is too inflexible a process to deal sensitively and appropriately with a matter such as this.

First, by locating the right to die in the federal constitution, the courts below nationalized the issue and eliminated the possibility of state variation and experimentation. Justice Brandeis's characterization of the states as "laboratories of democracy" is no cliche; it is an apt description of one of the principal virtues of a federal system. In this case, there is no serious argument that national uniformity is necessary or even desirable. The State of Oregon has undertaken an experiment in physician-assisted suicide that — however misguided it may appear to many of us — will cast light on the practical consequences: on the efficacy of the safeguards against abuse, on the ability of the medical profession to recognize and treat clinical depression and pain in patients requesting suicide, on the robustness of the lines drawn between permitted and forbidden forms of the right to die, and on the danger that death will come to be perceived as a duty owed to family and society. To treat this social policy question as controlled by federal constitutional law is to eliminate the possibility of a multiplicity of approaches, and of regional variation in light of differences in social and moral perceptions.

Even a leading advocate of physician assisted suicide, and sometime co-author with respondent Quill, has recognized that the right to die should be the subject of legislative reform rather than judicial fiat:

> Legalization of physician assisted suicide should be understood not as a matter of recognizing rights but as a policy aimed at making available a compassionate option of last resort for competent, terminally ill patients. Since we do not know whether such a policy will produce more good than harm, it should be viewed as an experiment.
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> Our federal system of government has often been touted as offering "a laboratory of the states," with which to experiment concerning social policy. In the case of a morally controversial issue, subject to competing arguments pro and con, it is better that policy experimentation occur piecemeal, by the various decisions of the legislatures or voters of the states, rather than wholesale, by means of the constitutional adjudication of the federal courts.

Franklin G. Miller, *Legalizing Physician-Assisted Suicide by Judicial Decision: A Critical Appraisal*, 2 BioLaw S:136, S:144 (Special Section, July-Aug. 1996).

Second, by their nature constitutional judicial decisions must be "grounded truly in principle"; they may not be "compromises with social and political pressures." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 865 (1992). The lines drawn by courts, under the authority of the Constitution, must be defensible at the level of constitutional principle.

Yet not every aspect of social life can be governed by crisp and principled rules. Sometimes, the best and most peaceful solution to contentious moral conflicts in society is not to award the brass ring to one side or the other, but to construct compromises that allow each contending force to believe that the system has been responsive to their deeply held convictions. Legislatures are good at that. Whatever one may think of legislators as moral deliberators, few would dispute that they have the expertise and incentive to resolve social conflict in a way that minimizes political opposition and resistance. The legislative answer may not appear pure from a philosophical or analytical perspective, but it is likely to reduce social discord. And even if legislatures prove unable to forge a stable consensus, contending social forces are more likely to accept the outcome of a process in which their voices were heard

than an imposed solution in which their elected representatives were not entitled to a significant role.

The right to die may well be such an issue. Certainly, the public is seriously divided. Passions run high. The various lines that might be drawn — refusal of treatment versus suicide, assisted suicide versus active euthanasia, terminal illness versus chronic pain or disability, actual consent versus imputed consent, intolerable pain versus other conditions that harm the quality of life, one set of safeguards versus another, and so forth — are, each of them, arbitrary in their own way. Each of them attempts to allow the dying patient some greater degree of control over the circumstances of his death, while at the same time upholding the society's obligation to honor life and protect the vulnerable. Each tries to reconcile two honorable impulses that are, in principle, irreconcilable: autonomy and protection. Prudential compromises are difficult to justify as interpretations of the Constitution, but are the everyday product of legislative action.

Third, and most importantly, courts are seriously constrained in their ability to change their policy in response to experience and criticism. Each decision of the Court is said to be based on an interpretation of the Constitution, and it strains public credulity that the meaning of such an old document would change very rapidly, very often. The doctrine of *stare decisis* thus creates a presumption in favor of existing doctrine. Stability is a source of judicial strength and legitimacy. But with this strength comes a caution: just as the Court is properly reluctant to jettison a constitutional doctrine that it has embraced, the Court should be reluctant to embrace novel constitutional doctrines that may require modification in the future.

This case is a perfect example. If the Court joins the lower courts in creating a right to assisted suicide, neither Congress nor the states will be able to explore contrary policies. If that judgment proves to be misguided, great injury will have been done to thousands of vulnerable persons, in every state in the Union, until the Court brings itself to acknowledge the mistake and reverse the decision. On the other hand, if the Court reverses the judgments below, debate on the issue will proceed. The several states will be free to pass laws allowing assisted suicide or euthanasia in such circumstances and under such safeguards as they may deem

advisable. If experiments with liberalized laws on this subject are successful, it is likely that still more states will follow suit. If they prove misguided (as we expect), these states can reverse course, and the other states will profit by their example.

One final observation about the institutional capacities of courts and legislatures bears mention. Since the *Carolene Products* decision, prominent strains of constitutional theory have maintained that the judiciary should be most willing to intervene in cases where the adverse consequences of the challenged law are borne by discrete and insular minorities whose interests may not have received their just weight in legislative deliberations. See generally John Hart Ely, DEMOCRACY AND DISTRUST (1980). Whatever the merits of that view, we wish to stress that it has no application to this case. When the New York legislature decided to retain its laws against assisted suicide, or the people of Washington made a similar decision by referendum, they were not legislating for a discrete and insular minority. They were legislating for themselves and for their loved ones, behind a veil of ignorance that denies all of us the knowledge of what our condition may be in the final days of our lives. There is no reason to distrust the conclusions that they reached.

If anything, the biases of the political process run the other way: in favor of fewer protections against euthanasia than may be in the best interests of those immediately affected by the law. Studies indicate that the frail elderly, who are most likely to feel the effects of the law in this area, are significantly less likely to favor legalizing assisted suicide than the young and healthy. Harold G. Koenig, et al., *Attitudes of Elderly Patients and Their Families Toward Physician-Assisted Suicide*, 156 Archives of Internal Med. 2240 (Oct. 28, 1996) (only 34% of elderly outpatients favor legalizing physician-assisted suicide, as compared to 55.6% of their families; female, black, and economically disadvantaged patients were most likely to oppose it). This is not surprising. From the vantage point of youth and health, the quality of life enjoyed by disabled, chronically ill, or dying people appears excruciatingly low. But persons experiencing those conditions, whose point of comparison is not youth and health but death, often cling to life with increased tenacity. Self-interest, both individual on the part of family members and collective on the part of health

care providers, also plays its part in shaping opinion on this issue. The logic of *Carolene Products*, in this context, is that courts should be more active in ensuring that the protections against unwanted death are adequate than in ensuring that the political process is sufficiently receptive to the right to die.

II. The Decision Of The Ninth Circuit Is Antithetical To This Court's Traditional Approach To Interpreting The Fourteenth Amendment

A. The Fourteenth Amendment Takes Its Bearings From The Experience Of The Nation, Not From The Moral Intuitions Of Federal Judges

Constitutional judicial review had its birth in the recognition that a written constitution reflects the limits that the people of the United States have placed upon their government. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). It was no part of the theory of judicial review that the courts are superior to the people in their judgments of what those limits should be. It is revealing that the examples deployed by Chief Justice Marshall in his great exposition of the theory of judicial review consisted of explicit limitations unambiguously violated by the government. *Id.* at 178. In such cases, it was clear that judicial review served to enforce the will of the people rather than the will of the judiciary.

Nonetheless, in the 209 years since the Constitution was adopted, this Court has not infrequently held unconstitutional acts of the political branches that do not violate any express provision. The most common basis for so doing is the Due Process Clause of the Fourteenth Amendment. This presents a jurisprudential problem: The very language of the Due Process Clause, which forbids the denial of life, liberty, or property *without* due process of law, necessarily implies that states *may* deny life, liberty, and property if due process of law is provided — unless some other provision of the Constitution is implicated. The notion of "substantive due process," as many distinguished commentators have pointed out, is an oxymoron — like "green pastel redness," in the famous comment of John Hart Ely. *Democracy and Distrust*, *supra*, at 18.

From the perspective of text and history, the Privileges or Immunities Clause of the Fourteenth Amendment would appear to

be a more plausible basis for the protection of substantive rights (whether incorporated from the Bill of Rights or based on other sources) than the Due Process Clause. See *id.* at 22; Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last?"*, 1972 Wash. U. L. Q. 405, 419. It provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." As discussed below, the language "privileges or immunities" was a legal term of art that also appears in the Comity Clause of Article IV, and that had been interpreted as referring to the essential rights and freedoms recognized in the American constitutional tradition.[18]

Why does this matter? Any constitutional jurisprudence of substantive rights, if conducted under the rubric of the Due *Process* Clause, must necessarily appear to be based on something other than constitutional text and the authentic purpose of the Fourteenth Amendment — indeed, such a jurisprudence will appear to have been created by judges with no delegation of constitutional authority by the people. Not only does this give the very idea of

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[18] This would require reconsideration of the reasoning (though not necessarily the result) of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which reduced this Clause to the redundancy of protecting only those rights already protected under the Constitution and arising as a matter of federal citizenship. But the overwhelming weight of historical and scholarly opinion is that *Slaughter-House* was wrong in this regard. See, *eg.*, Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 100 Yale L. J. 1193, 1257-59 (1992); Raoul Berger, GOVERNMENT BY JUDICIARY: THE JUDICIAL TRANSFORMATION OF THE FOURTEENTH AMENDMENT 37-49 (1977); Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 175-77 (1986); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 100 Yale L.J. 1385, 1466-69 (1992); Walter E. Murphy, Slaughter-House, *Civil Rights, and the Limits on Constitutional Change*, 1987 Am. J. of Jurisprudence 1, 1-8 (1987); William E. Nelson, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 156-64 (1988). A rare exception to this scholarly consensus is Robert Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 36-39 (1990).

For an explanation by the author of this brief of the reasons why *Slaughter-House* was inconsistent with the text and original meaning of the Fourteenth Amendment, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 999-1000 (1995).

judicial protection of rights not specified by the text an undeserved aura of illegitimacy, it also — and more importantly — deprives us of a textual or historical basis for distinguishing between responsible and irresponsible exercises of that judicial power. Once it is recognized that the Privileges or Immunities Clause authorizes protection for rights *understood in a particular way*, there is a solid basis for distinguishing between legitimate and illegitimate uses of that power.

Although the Due Process Clause is essentially about process and the Privileges or Immunities Clause is essentially about substantive rights, the underlying principles and methodologies for application are consistent and complementary. The task of interpretation is greatly eased by the fact that each Clause had its counterpart in the Bill of Rights and Article IV, respectively, and each had been authoritatively interpreted at the time those terms were used in the new Fourteenth Amendment. When the framers of the Fourteenth Amendment used familiar legal terminology, it may be inferred that the terms were intended to be interpreted in light of then-prevailing doctrine.

The leading case interpreting the Privileges and Immunities Clause of Article IV in the years prior to the Civil War was *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (1823), written by Justice Bushrod Washington on circuit. The court defined the privileges or immunities of citizens as consisting of:

> those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.

In other words, these "fundamental" rights[19] had two characteristics: (1) they were recognized by "all free governments,"

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[19] It should be noted that the term "fundamental" rights did not necessarily mean rights that are especially important. Rather, in England, America, and western Europe, "fundamentality" most often referred to the character of being long-standing or ancient. See J.G.A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 30-36, 47-55 (1957); J.W. Gough, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 160 (1955).

and (2) they had been enjoyed by citizens "of the several states" from the beginning of the Republic. *Corfield* was repeatedly cited by proponents of the Fourteenth Amendment to explain what rights the new Amendment would protect.[20]

The leading case interpreting the Fifth Amendment Due Process Clause prior to the Civil War was *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856). In that case, Justice Benjamin Curtis (later to be the leading dissenter in *Dred Scott*) offered the following methodology for determining what "due process" entails in any particular case:

> We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political constitution by having been acted on by them after the settlement of this country.

In the first important due process case after ratification of the Fourteenth Amendment, *Hurtado* v. *California*, 110 U.S. 516 (1884), the Court reiterated this interpretation. This formulation suggests that due process embodies (1) explicit constitutional provisions, plus (2) long-established procedural rights ("modes of proceeding") that had existed in America from the beginning.

These two clauses of the Fourteenth Amendment thus have two common features. First, they take their bearings from the long-established rights and procedures of the American states. They are, accordingly, *preservative* rather than *transformative*. They are guarantees against unwarranted and unwise innovation; they are not invitations to judicially-mandated social change. This does not mean that the rights protected by these clauses are frozen in time. They may change as society changes. But before a claim may be accepted as a Fourteenth Amendment right, and imposed on the people of all the states, it must have withstood the test of time.

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[20] See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1835-36 (Apr. 7, 1866) (Rep. Lawrence); *id.* at 474-75 (Jan. 29, 1866) (Sen. Trumbull); *id.* at 2765 (May 28, 1866) (Sen. Howard).

The Fourteenth Amendment is not a license for judicial social experimentation.

Second, the two Clauses have the effect (as intended by the framers of the Fourteenth Amendment) of nationalizing the question of rights. Prior to the Fourteenth Amendment, the states were the principal locus of rights protection. Thus, the privileges and immunities of Americans were described in Article IV as "Privileges and Immunities of Citizens *in the several States*"; but in the Fourteenth Amendment these rights became known as "privileges or immunities of citizens *of the United States*." Moreover, under the new Amendment the power of the United States was deployed to prevent any state from abridging these rights, even as to its own citizens. Thus, the concept of rights became national. As John Bingham of Ohio, principal author of the Amendment, explained, it "protect[s] by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).[21]

In practice, as interpreted by *Corfield*, *Murray's Lessee*, and *Hurtado*, this means that an individual may challenge the denial of any right that has been recognized by a sufficiently large number of states for a sufficiently long period of time that it can truly be said to be part of the fabric of American liberty. (Analogies might be drawn to the process of divining customary international law from the established practices of many states, or of determining the general common law in the period before *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).)

In the years since *Corfield*, *Murray's Lessee*, and *Hurtado*, this Court has sometimes exceeded the authority implied by those cases, and has invalidated legislation without valid warrant in either express constitutional provisions or the settled judgment of the Nation. The most obvious examples are the decisions known as "the *Lochner* era." In other decisions, which have gained in respect

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[21] For further elaboration of this point, see Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy.-L.A. L. Rev. 1159, 1164-68 (1992).

and influence over the years, the Court has defined the reaches of unenumerated rights in terms not dissimilar to those in *Corfield*, *Murray's Lessee*, and *Hurtado*.

In his prescient dissent in *Lochner* v. *New York*, 198 U.S. 45, 76 (1905), Justice Holmes argued that instead of deciding the case on the basis of their own economic theories, the Justices should rely on "fundamental principles as they have been understood by the traditions of our people and our law." This approach was embraced by the Court in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934). In that case, Justice Cardozo explained that the Fourteenth Amendment protects rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 105. See also *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (recognizing "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality by Powell, J.) ("the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality).

Perhaps the leading statement of this approach in the modern period was Justice Harlan's dissenting opinion in *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961), later to form the basis for his opinion in *Griswold*:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

Harlan did not engage in speculative inquiries about what freedoms he deemed most important to human life. Rather, he asked the concrete question: how has the asserted right been treated by the 50 states and by other nations? In the case of laws prohibiting the use of contraceptives, Harlan found "conclusive" the "utter novelty of this enactment." *Poe*, 367 U.S. at 554-55; see also *Griswold*, 381 U.S. at 499. Neither the federal government, any other state, nor any other nation, he found, "has made the *use* of contraceptives a crime." *Poe*, 367 U.S. at 554.

If Harlan's interpretive method departs from that in *Corfield*, *Murray's Lessee*, and *Hurtado*, it is solely in his emphasis on tradition as a "living" thing. It is not necessary, Harlan seems to be saying, that the tradition have existed unbroken from the time of the Founding. It is sufficient — as his analysis in *Poe* and *Griswold* bears out — that a substantial consensus of the states had recognized the right for a period long enough that it came to represent the will of the Nation.[22]

Harlan's central insight is that constitutional judicial review under the Due Process Clause *must not be based on the judges' own "unguided speculation."* Accord, *Casey*, 505 U.S. at 849 (the fact that the boundaries of substantive due process "are not susceptible of expression as a simple rule * * * does not mean that we are free to invalidate state policy choices with which we disagree"). The judges must, instead, seek the "balance" that "*our Nation*" has struck. This does not mean that judges are entitled to don the robe of the philosopher king and second-guess the decisions of legislatures. As in *Marbury*, there is no suggestion that the judges are superior to the people in their capacity to determine the proper restraints on government. The judges instead must enforce

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[22] The necessity of viewing tradition as a "living" thing was reaffirmed in *Burnham* v. *Superior Court*, 495 U.S. 604 (1990) (plurality per Scalia, J.). In *Burham*, the Court explained that when traditionally approved procedures have been abandoned by all but "a very small minority of the States," they become vulnerable to due process challenge, however "traditional" they may once have been, but where the challenged practice "is both firmly approved by tradition and still favored," it cannot be said to violate due process. *Id.* at 622; see also *id.* at 615 (noting that the challenged pracatice is "not only old; it is continuing").

the will of the people as it is reflected in the traditions which they have developed, as well as the traditions from which they broke.

This approach makes sense because judicial interpretations based on longstanding customs and practices are grounded — like the text of the Constitution itself — in the will of the people; because longstanding experience — in contrast to philosophical speculation — provides a sound empirical basis for reasoned judgment; and because the legal terms used by the framers of the Fourteenth Amendment were understood at that time to be references to long-established rights and privileges. The contrasting approach, adopted by the courts below, divorces itself from popular will, replaces the experience of history with judicial whim, and has no legitimate basis in the history and political theory of the Fourteenth Amendment.

B. The Abortion Cases Should Serve As A Cautionary Note Rather Than A Precedent

There is only one significant area in which this Court has departed from this approach to the Due Process Clause: the abortion cases. In *Roe* v. *Wade*, 410 U.S. 113 (1973), this Court struck down a state law prohibiting abortion notwithstanding the fact that such laws had been in place in at least 45 states for at least 100 years. The Ninth Circuit relied heavily on those cases. Pet. App. A25-A28, A56-A58.

Strictly as a matter of precedent, the Ninth Circuit's reliance was misplaced.[23] Essential to the holding of *Roe* was the conclusion that fetuses or unborn children are not constitutional "persons" and that their status as persons was beyond the ken of court or legislature. 410 U.S. at 158-59. By contrast, no one has questioned the indubitable fact that the patients involved in these cases are persons in every sense of the word. The *Roe* holding that fetuses, as non-persons, fall outside of the state's legitimate role of protection says nothing about the proper disposition of this case. Moreover, in the years since *Roe*, many commentators have come to the conclusion that the abortion right is more plausibly predicated on the fact that abortion laws bear most heavily on

[23] See generally Seth Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 Am. U. L. Rev. 803 (1995).

women and thus raise a problem of sex discrimination.[24] Whatever one may think of that argument, it has no application to these cases, which involve laws that potentially apply to every one of us, without distinction.

The Ninth Circuit found "highly instructive" and "almost prescriptive" (Pet. App. A57) language from the *Casey* plurality opinion that referred to "the most intimate and personal choices a person may make in a lifetime," and which stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*, quoting *Casey*, 505 U.S. at 851. With all respect to the Ninth Circuit, those quotations will not bear the weight put on them.

Like other highly generalized formulations about liberty — for example, the "right to be left alone" — the statement in *Casey* cannot be understood literally, as "prescriptive" of specific rights. The statement is so general and abstract that it could mean anything or nothing. It surely does not mean that every intimate or personal choice is constitutionally protected. Rather, it must be read in the context of the opinion as a whole. In light of the plurality's emphasis on the "unique" character of the abortion decision (*id.* at 852), it is untenable to stretch these statements to cover the entirely different context of assisted suicide.

This Court has cited *Roe* in support of a new substantive due process right only once since *Roe* was decided 23 years ago, and that case was amply supported by traditional due process methodology. *Moore* v. *City of East Cleveland*, *supra*.[25] In the

[24] See, *e.g.*, Guido Calabresi, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 99-102 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1199-1202 (1992); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 382, 386 (1985); Martha Minow, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 56-60 (1990); Cass R. Sunstein, THE PARTIAL CONSTITUTION 270-85 (1993); Laurence H. Tribe, ABORTION: THE CLASH OF ABSOLUTES 105 (1990); see also Richard Posner, SEX AND REASON 339-40 (1992) (noting that the "focus" of *Roe*'s defenders has "shifted to the equal protection clause").

[25] *Roe* has been cited in several cases involving the right to contraceptives, but in light of *Griswold* these cannot be said to be new substantive due process rights. It has also been cited in several equal protection cases.

meantime, the Court has refused to recognize asserted rights to engage in acts of homosexual sodomy, of patients to choose their own form of medical treatment, of a father to enjoy visitation rights with his child born of an adulterous relationship, of prisoners to contact visits while in pretrial detention, of unrelated persons to share a home together, of a person to be free from governmental distribution of derogatory information about himself, of a psychiatric patient to be free from compulsory hospitalization, of an employee to be warned of workplace hazards, and of juvenile aliens to be placed in noncustodial settings. Far from suggesting that the abortion cases justify an expansion of substantive due process into other matters of great personal importance, these decisions show that the Court has been extraordinarily reluctant to extend the precedent. *Collins* v. *City of Harker Heights*, 505 U.S. 115, 125 (1992); *Reno* v. *Flores*, 507 U.S. 282, 302 (1993). This vitiates any plausible claim that the abortion precedents compel recognition of a right to assisted suicide.

More fundamentally, we submit that the abortion cases should not be treated as an unalloyed success, to be imitated in other areas of our national life. While this Court has decided to adhere to the fundamental holding of *Roe* for reasons of *stare decisis* and settled expectations (*Casey*, 505 U.S. at 854-69), it is apparent to many (even to supporters of the "right to choose") that the Court's sweeping decision, at one stroke, to invalidate the laws of almost every state on a matter that is deeply controversial among the people of this nation, was of questionable legitimacy and even more questionable prudence. Now, almost a quarter century after the *Roe* decision, the abortion question continues to be the most divisive in American politics, poisoning everything from presidential nominating conventions to the confirmation hearings of Supreme Court Justices. Many supporters of abortion rights believe that those rights would have been achieved with less contention and greater public acceptance if the matter had been left to the political process, as in other Western nations. There is no reason to repeat those mistakes in this context.

C. The Asserted Right To Assisted Suicide Is Not A Fundamental Right Under The Fourteenth Amendment

The decision of the Ninth Circuit is antithetical to the traditional approach outlined in *Corfield*, *Murray's Lessee*, and

Hurtado and articulated more fully by Justice Harlan. The claim of a right to assisted suicide may be a respectable philosophical position, but it has absolutely no foundation in the explicit provisions of the Constitution or in the balance "our Nation" has struck.

Assisted suicide is prohibited by statute in 35 states and by common law in 11 more.[26] In only one state, Oregon, is it expressly permitted, and then only recently. These laws reflect a longstanding common law tradition against allowing suicide in any form. Even the Ninth Circuit traces the common law prohibition of suicide to the 13th Century, acknowledges that the Western treatment of suicide as a crime persisted for 1,000 years, and admits that the medical ethical prohibition of assisting suicide dates to the time of Hippocrates. Pet. App. A44-A45, A94. The tradition embodied by these laws is — moreover — a "living" one. Nine states have strengthened their statutory prohibitions in the past five years.[27] State legislatures in an additional 15 states[28] have debated the issue since 1991, and all have decided to retain their laws. Referenda proposing legalization of assisted suicide have been rejected by the voters of California and Washington (though accepted by the voters of Oregon). The courts of at least 17 states, interpreting their common law, have distinguished assisted suicide

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[26] Citations to these statutes and decisions may be found in footnotes 12, 13, and 14 of the *Brief Amicus Curiae on Behalf of Members* of the New York and Washington State Legislatures.

[27] 720 Ill. Comp. Stat. Ann. § 5/12-31(a)(2) (effective Aug. 29, 1993); Ind. Code Ann. § 35-42-1-2.5(b) (approved Apr. 30, 1993); Iowa Code § 707A.2 (approved Mar. 1, 1996); 1994 Ky. Acts, ch. 269, § 2 (effective July 7, 1994); La. Rev. Stat. Ann. § 14:32.12 (effective June 16, 1995); Mich. Comp. Laws Ann. § 752.1027 (effective Mar. 31, 1993); N.D. Cent. Code § 12.1-16-04 (effective July 1995); R.I. Gen. Stat. tit. 11, § 60 (approved 1996); Tenn. Code Ann. 39-13-216 (approved 1993).

[28] Alaska, Arizona, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New Mexico, Vermont, Washington and Wisconsin.

from the established right to refuse treatment.[29] The American Medical Association, the American Geriatric Society, the American Psychological Association, and the American Bar Association, have all debated the issue in recent years and declined to endorse legalization. Interdisciplinary task forces in New York and Great Britain have unanimously voted to retain laws against assisted suicide. The drafters of the Model Penal Code retained prohibitions against assisted suicide without any exceptions. MODEL PENAL CODE § 210.5(2) (Official Draft and Revised Comments 1980). The Supreme Court of Canada has rejected an asserted right to assisted suicide. *Rodriguez* v. *British Columbia (Attorney General)*, [1993], 3 S.C.R. 519. No unreversed courts — other than the courts below — have ever accepted such a claim.

In the face of this nearly unanimous tradition, which enjoys considerable support to this day, it is simply disingenuous to claim that assisted suicide reflects the balance that "our Nation" has struck. It represents nothing other than the balance that the judges on the Ninth and Second Circuits have struck. See *Reno* v. *Flores*, 507 U.S. at 303 (citations omitted) ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'").

The Ninth Circuit opinion is virtually a parody of proper constitutional analysis under the Fourteenth Amendment. In contrast to Justice Harlan's insistence that rights must be grounded in historical experience, the Ninth Circuit declared that "earlier legislative or judicial recognition of the right or interest is not a sine qua non" (Pet. App. A35). Remarkably, in its survey of "Historical Attitudes Toward Suicide," the court below disregarded unbroken and virtually unanimous state practice in favor of a combination of inapposite ancient views and modern polling data. The court began with "ancient attitudes," in which suicide "was

[29] Citations may be found in the *Brief Amicus Curiae on Behalf of Members* of the New York and Washington State Legislatures, at 24-27 & n.25.

often considered commendable." Pet. App. A40.[30] The court was unperturbed by the fact that, by its own evidence, suicide was commended in cases of dishonor, grief, guilt, and weariness of life. Pet. App. A40-A42; see also *id.* at A41 ("The Stoics glorified suicide as an act of pure rational will."). Since not even the Ninth Circuit thinks we should go that far, this glorification of suicide would appear to be a tradition from which we have broken, rather than one that reflects "our Nation's" balance between liberty and the demands of organized society. It is a strange basis for saying that modern statutes, reflecting the modern respect for life, are unconstitutional.

After devoting several paragraphs to the early Christian martyrs (who did not commit "suicide" as it is ordinarily understood, but simply worshipped God and paid the price), the court grudgingly acknowledged — *in one clause of one sentence* — that the "view that suicide was in all cases a sin and crime held sway for 1,000 years" (Pet. App. A44). The court moved quickly to the more convenient fact that some "philosophers, poets, and even some clergymen" began to dissent in the 17th century. *Id.*

[30] Although space will not permit us to engage in a debate with the court below over its reading of historical sources, the observant reader cannot fail to notice the one-sided and selective nature of the court's account. For example, the court invoked the distinguished name of Plato in support of the practice of suicide, (Pet. App. A41), but failed to mention that Aristotle, no less impressive an authority, took the view that suicide was unjust under all circumstances. Aristotle, NICOMACHEAN ETHICS, chap. 5, 1138a. Similarly, while the court's statement that suicide was not "universally prohibited" in Greek times and was sometimes "considered commendable" (Pet. App. A40) is literally true, it might have been more balanced to acknowledge that, according to the historian on whom the court relied, suicide was generally disfavored, and euthanasia was not practiced. A. Alvarez, THE SAVAGE GOD 58 (1971), discussed in the NEW YORK REPORT, at 78 & n.5. Most strikingly, the court cited seven poets and philosophers of the early modern period who "challenge[d] the all-encompassing nature of the dominant ideology" (Pet. App. A44) — failing to mention that such luminaries as John Locke and Immanuel Kant (among others) defended the traditional ban on suicide. See NEW YORK REPORT, at 81.

In short, while the Ninth Circuit's historical survey is not literally inaccurate, its selective use of evidence seems designed to suggest that suicide enjoyed more support in past ages than it actually did. The court's pejorative reference to "the dominant ideology" (Pet. App. A44) effectively concedes that the anti-suicide tradition was, in fact, "dominant."

The court also drew comfort from the fact that, on the eve of the Reign of Terror, the revolutionary regime in France legalized suicide. *Id.*

Unable to gainsay the common law prohibition of suicide, which dates from at least the 13th century and was endorsed by some of the greatest figures in English legal history, the Ninth Circuit attributed this legal norm to "taboos" and to "the ancient fear that the spirit of someone who ended his own life would return to haunt the living." Pet. App. A46. The court then made much of the decriminalization of suicide in the last century (Pet. App. A46-A47), without pointing out that the reason for this was that punishment was deemed an inappropriate social response. See e.g., *State* v. *Marti*, 290 N.W.2d 570, 581 (Iowa 1980) ("The only reason we view suicide [as] noncriminal is that we consider inappropriate punishing the suicide victim or attempted suicide victim, not that we are concerned about that person's life any less than others' lives); *Commonwealth* v. *Mink*, 123 Mass. 422, 429 (1877) (repeal of sanctions for suicide "may well have had its origin in consideration for the feelings of innocent surviving relatives"); Testimony of Prof. Victor Rosenblum, HOUSE HEARINGS, at 283.

As noted, 46 states now prohibit assisted suicide, and many of those prohibitions are the product of recent deliberation. The Ninth Circuit gives no weight to this legislative record. Instead, the court cites public opinion polls that, according to the court, show popular support for a change in the laws. Pet. App. A48-A49. Incredibly, the court draws further support from the fact that, while voters rejected assisted suicide in referenda in California and Washington, the votes were close. The court's infatuation with polling data extends even to professional opinion, since the court relied on polls purporting to show that physicians support assisted suicide — (*id.* at A92-A93) — even though their professional organizations are formally on record as opposing it and the precepts of medical ethics forbid it.

It hardly needs be said that constitutional law should not be governed by public opinion polls. We doubt seriously that the Ninth Circuit would be greatly impressed by polls showing overwhelming support for school prayer, capital punishment, or laws against flag burning. We think it is far more significant that

every time the question of assisted suicide is subjected to *reasoned deliberation* — whether by legislature or by commission — the wisdom of the traditional prohibition is reaffirmed.

Putting aside its incursion into selective ancient history and its opportunistic invocation of opinion polls, the Ninth Circuit has literally *no support* for its conclusion that the right to assisted suicide is grounded in this nation's history or tradition.

To affirm the decision below would require an extraordinary transformation of constitutional principles. Since the decision has no basis in constitutional text, no basis in original understanding, no basis in the traditions of the nation, no basis in the protection of a discrete and insular minority, and no real basis in precedent, affirmance would stand for the bald proposition: the Constitution authorizes courts to invalidate laws simply on the basis that the judges disagree with them. These cases present an ideal opportunity for the Court to reassure this Nation that the judiciary does *not* purport to exercise such a power.

CONCLUSION

The decisions of the courts below should be reversed.

Respectfully submitted.

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